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ABSTRACT

This document is one in a series of papers designed to explore the legal aspects of potential issues and problems arising in higher education. This particular paper deals with the case of a student suing his school board for fraud. His reasoning for the suit is that he can read only on the 7th grade level but was awarded a high school diploma anyway. The lawyers surveyed concerning this case either felt strongly that such an instance could never occur or that it would occur within the next 6 months to 4 years. Ninety percent of the lawyers surveyed were of the opinion that such a case could avoid going through the judicial process by going instead through legislation; 80% see the event as being beneficial to society; and 85% see the event as increasing the quality of education. (HS)

ED 062 910

EMERGING EDUCATION POLICY ISSUES IN LAW

FRAUD

November 1970

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Note: The back cover details the Major Conclusions for easy reference.

INTRODUCTION

Most of the nation's legislators have been trained in the law. Most are members of the Bar and have had practical experience in the law.

Most major changes in our dynamic society are instigated through legislative review. These changes will help determine the future of this society.

Policy analysis for the future is done by so-called experts for use by clients who request analysis, including the highest offices in the country. Advisement is an extremely tenuous role at best, and demands that the advisory group tap for expertise individuals whose opinion can be trusted to be a valuable input to the policy process.

Most policy issues in education sooner or later reach the courts and prompt legislative action. These processes are primarily controlled by men trained in law.

What follows is an initial experiment with a selected number of attorneys attentive to the future of education on a national level. The focus may have profound implications for education through the writing of policy for tomorrow.

The case: A student sues his school board for fraud . . . High school diploma awarded even though student only reads at the 7th grade level.

AN ANECDOTAL DIGRESSION

Early in the Fall of 1970 I stood talking with a group of law students at a major university in the East discussing their work on a law review. They described to me the work they did and the power they had over other reviews in the country. As a repository institution, they received decisions long before other schools did, and they noted that immediacy and relevance were the key problems in law review preparation. Their primary tasks were to comment on the emerging cases of the day.

I described the Marjorie Webster case to them and they found no excitement in the anti-trust issue. I posed a conjecture to them and said, "What if a student sued his school board for fraud?"

They responded--to a man--"It can't happen." I asked why. They responded, "There is no precedent for it." I went away.

* * * * *

Several weeks later in a similar gathering at the same school, I mentioned that the evening edition of a paper which I knew they could not have yet read detailed the fraud case described above as having occurred. I treated it as an occurred reality. I said that the paper in its incomplete style of reporting had omitted the arguments presented in the case. I asked the group for their estimates as to the positions of the two sides of the case. They were filled with ideas that would have been sufficient for the successful pursuit of the case only when they were convinced it had occurred and was done. They could then describe several strategies to implement its occurrence.

I told them I lied . . . They went away.

NOTES AND COMMENTS TO THE STUDY AND RESPONSE

This study attempted to determine if there was any substantial truth to the hypothesis drawn from the author's observation noted in the preceding digression--students preparing for the legal profession were operating with a mind-set that prevented conjecture about advocacy.

The experiment materials (included in the next section) included: (1) a brief letter that outlined the purpose of the EPRC and stated our concern with developing issues in law; (2) a news event of a hypothetical case of fraud that "had been" successfully pursued through the courts; (3) a brief summary of the Marjorie Webster case extracted from a report written by James Koerner; (4) a series of questions for the respondents to address.

The materials were mailed to members of the Bar from several backgrounds. They included chief legal counsel for various State Offices of Education, legal counsel for the Office of Education, members of House Committees, Deans of law schools, representatives of private law firms that represent major private and public institutions of higher learning, and counsel for leading private corporations engaged in peripheral educational activities for profit.

Respondents, the results indicate, grouped around either one of two positions: it could never happen, or it would happen soon.

Those who felt it could never occur generally could be divided into one of two groups. There were those who were willing to respond to the substantive questions only after pointing out that it could not occur. They argued that the Marjorie Webster case was hardly an acceptable precedent base from which the fraud question could arise. The second group responded to the questions only where it was consistent with their belief that it would not occur--that is, they left many of the questions unanswered.

The other group tended to respond that the event would occur and in the next six months to four years. They staged answers to the questions in detail. They were able to deal with the event either in fantasy or in conjecture--that is, they were able to treat it as an occurred reality.

The experimenter recognizes the many mistaken notions pointed out to him by the respondents, but feels that the results more than outweigh the problems inherent in the legal naivete of the researcher.

FOCUS OF STUDY
(Hypothesis)

It is generally believed that men are shaped by their past to deal with their future. Any extended experience in a job or in training will affect the lives of those men who partake of it. It is true in the field of education. It is true in the field of law.

Elective offices at all levels of the political system are for the most part filled with men whose formal educational experience includes some background in law. The legislature defines the parameters of acceptable growth and change for society by legislating certain activities and acceptable modes of behavior to the society. This truth cannot be overlooked in discussions about policy and decision-making which affect the future.

The rhetoric of futures-thinkers has as one of its basic tenets that the future is filled with alternatives. We need only describe the futures we see as acceptable alternatives to today and we can plan for their occurrence by striving for certain ends at the deliberate exclusion of others. No single alternative future is necessary, but many alternatives are possible and policy can be designed to make any of them probable. These various futures may fill the spectrum from good to bad, but each are in turn acceptable futures--each an alternative to the present.

To describe alternative futures one conjectures a state of affairs different than today. After locating that future in the continuum of time, one can describe the minimum sufficient changes that must occur in order for the specified alternative future to occur. When men conjecture, they must describe new combinations emerging that may never have occurred in the past, and they must demonstrate the plausibility of a future that is new or decidedly different than we have ever known. Conjecture is a leaping into

the unknown with a tracing of strategic routes back to the present in order to describe how a specified future could come to be.

But men do not conjecture when they extrapolate, i.e., describe how things might come to be by demonstrating how they came to be. Conjecture is intuitive and deals with the behaviors of men sufficient to reach an un-occurred future; extrapolation is reflective and deals with behaviors which once were really only sufficient, but have come to be seen as necessary by the very fact of their having occurred.

Forecasting the future by describing analogies from the past excludes the impact of individual human beings on the lives of men, and treats all men as constant through time, holding similar--never changing--beliefs, values, morals, and needs. The future is an abstraction. It exists in each man's mind and will be experienced as such by each when it becomes the present. The law does not deal in abstractions. The law does not conjecture. The law draws its strength and power from the continuance of the past into the future in some quantifiably larger or smaller fashion.

The prescriptive power of the legislators of our country is not addressed here. What is addressed is the mind set that describes our emerging future in terms inconsistent with the rhetoric of alternative futures, because legal training emphasizes the non-alternative past.

There can be no true alternative future if the future is seen as necessarily linked to the past. There can only be alternative futures when the future is seen as linked to the present by actions sufficient to move us from what has been to what could be.

The law is steeped in the past through the emerging history of cases. It depends on the continuance of belief in the meaning of right and wrong. But changes do occur. They occur regularly through various precedents. Often these precedent setting cases are referred to as landmark decisions.

What are landmark decisions or precedents? They are nothing more than sufficient alternative ways of describing the meaning of our world so that all that has come before is no longer necessarily correct. Further, they are the conjectures of a discrete man representing another who believes there is an alternative sufficient argument to substantiate his view.

Precedential cases change the shape and meaning of the society. They are as revolutionary in their long-range effects as are the actions of mobs and social class upheavals; but they have a unique distinction that should not be lost in this discussion. Precedent setting cases are always actions of "one man vs. the past"--one man having an alternative sufficient perception of the meaning of his world. People like Escobedo, Brown, King, etc., coupled with the actions of their counsel, describe to a world a state of affairs where their actions demand reassessment and are heard in court, and if successful, then throughout the land. De Toqueville argued that mass movements follow the actions for change initiated within the system, not its inverse. The decisions of the courts are then not necessary, only sufficient. But over time these decisions, by repetition, come to be treated as necessary.

Every profession that continues through time develops habits. Habits are hard to break because the actions that comprise the habit come to be seen as necessary ways of behaving, thinking, or acting. We try to break habits when we conjecture about the future. Education in our society is a habit. But educational modes and styles change daily.

The major upheavals in our society today are in many ways directly linked to education--a process not in the control of those who experience it, nor experienced by those who control it. The youth of today are crying out with descriptions of alternative sufficient strategies of preparing themselves for the future, and are met on every side by the strategies thought to be necessary, imposed on them by the educating system. Both want the

young to learn. Is the strategy so important that the goal must suffer? Is there a necessary way to learn? Is our society capable of perceiving alternatives? Can precedents not be set for a change process that is non-revolutionary and allows the disaffected to input to the strategies for learning?

Point. There are emerging in our society precedent cases that, successfully pursued through the courts, could set the stage for still more change. These precedent cases can be conjectured about in the present to describe the probable and plausible actions they can set in motion by further decisions. These can and should be studied by the Educational Policy Research Center at Syracuse as a guiding source of reasoned policy assessment for the centers of decision-making in our capitols. We are prepared to carry out this work in earnest as a part of our early watchdog role and to supply all interested parties the results of the best conjectures of the legal professionals who are experts in their field. We believe it is essential to help the legal profession deal with the crises in the present more sufficiently and less necessarily. We believe that framing alternatives as occurred realities in the future may be a positive way to break the mind set of necessary and past-to-future links that negate the possibility of alternatives that are only linked to the present.

THE STUDY MATERIALS

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SURC **Educational Policy Research Center at Syracuse**

October 12, 1970

Dear Sir:

One of the prime forces of social modification and change in this country has been the effect of precedential case law. As a research group performing policy research for the United States Office of Education, we are interested in the implications of actions in law for education.

Much of the Syracuse EPRC's work is directed toward the implications of policy for the long-term future. A large part of our effort is directed toward collecting the conjectures of men in our society whose positions and background allow them to make reasonable judgments as to the long-term effects of current trends and events.

These "forecasts" are not an end in themselves; rather, they become valuable inputs into a process designed to supply policy-makers with reasonable alternatives which will aid policy-making and planning at the Federal level.

We are asking you to conjecture about the implications for education of a court case, written in the form of a short news story. On each of the cards in the enclosed packet is one question for you to answer concerning both the legal questions and the implications of the event presented.

The recent Marjorie Webster case, a summary of which is attached, is but one example of the possible effects of precedent law upon education. The main issue in that case is the application of anti-trust laws to educational institutions and agencies. The Court's decision may, in effect, help to produce a social definition of education as a consumer service, to be dealt with as such in the future. By specifying the student as consumer and the institution as a seller of services, an entirely new concept of the autonomy and integrity of educating institutions comes into question.

There are many other examples which support this trend. Corporations such as Westinghouse and Xerox now operate entire school systems. With the litigation concluded on the Marjorie Webster case, it is conceivable to conjecture a case where a student, or his parents, bring suit against an institution or its accrediting body, arguing that as a seller of services (learning stimuli) it has failed to deliver the promised product (learning increase)--in effect, holding the institution accountable for misrepresenting their services, or worse, not fulfilling their contractual obligation.

Syracuse University Research Corporation, 1206 Harrison Street, Syracuse, New York 13210 tel 315-477-8439

We are asking you to consider the implications of such a case, successfully pursued through the courts, on the future of education. The idea of a system of education being accountable to its students for content is worthy of serious attention at this moment in our history.

The news event concerning the case is stated in such a way as to help you deal with it as an occurred event rather than as an improbability which is not worthy of discussion. Many things that "could never happen," happen. We ask that you be as precise or as conjectural in your responses to the eight questions on the cards as you like.

You have been asked to participate in this exercise because of your past work and concern in the joint fields of law and education. Please return the response cards within ten (10) days of your receipt of this letter. You will receive a copy of the final analysis of all the responses as soon as it has been prepared and duplicated.

While all individual responses will be treated anonymously in the report, we would like to include a list of panel participants. If, for any reason, you would prefer to have your name deleted from this list, please inform us of this when you return your card packet.

Thank you for the time and attention you devote to this project, and for your concern for the future problems facing education in the United States.

Sincerely,

Stuart A. Sandow
Research Fellow

SAS:cm
Enc.

B.

Education Policy Issue

Accountability Future News Event

LAFAYETTE SCHOOL BOARD GUILTY OF FRAUD

The Supreme Court today refused to hear an appeal from the Third Circuit Court in the Case of John Brockman vs. The LaFayette Board of Education.

The case concerned the fact that while Brockman, 19, received a diploma from the LaFayette High School, he could only read at a seventh grade level.

His lawyers argued that the school system thus failed in its obligation to provide him with the learning skills they imply he received by awarding the diploma.

Judge Harold K. Smith commented, "This case could never have come to trial without the precedent set in the Marjorie Webster case of 1969, where the student was defined as a consumer for the first time. The implications for our system of education are profound."

The Appellate Court ruled in favor of Brockman over a year ago in a landmark case. The Brockman case is considered to be a direct result of the Webster case of 1969 where the Court ruled that it was valid to apply anti-trust laws to education. At that time, it was felt by many that a new era was dawning and that the implications of that decision would affect the course of education for many years to come.

C.

A Brief Summary of the Case of

Marjorie Webster Junior College

vs.

Middle States Association of Colleges and Secondary Schools*

*These extracts are taken from James D. Koerner's excellent review of the trial, "The Marjorie Webster Case: A Study in Educational Bureaucracy," in the Summer 1970 issue of The Public Interest.

Marjorie Webster Junior College is a private proprietary (i.e., profit-making) institution for girls in Washington, D.C. It brought suit against the Middle States Association of Colleges and Secondary Schools, which is a non-governmental, voluntary agency accountable only to their own membership, which evaluates educational institutions according to certain standards and criteria. They then accredit--that is, admit to membership--those institutions they deem qualified. The Middle States Association refused to consider Marjorie Webster eligible for admission and refused to come to their campus to examine them for accrediting purposes, in that they did not meet one of the pre-conditions of membership, that is, that they be non-profit. The case is not one of expulsion from the Association, but rather the prior and arbitrary exclusion from the process of accrediting itself. Accreditation means recognition by member institutions of each other's degrees. It also means these days, importantly, having the students entitled to various government monies and help if their institution is accredited. The suit was brought in 1966 after Middle States Association had rejected the college with an air of finality. Marjorie Webster filed its complaints. On February 24, 1969, the case came to trial before Judge John Lewis Smith, Jr., without a jury, in the United States District Court for the District of Columbia.

Some background on Marjorie Webster. In 1920, Miss Marjorie Webster and her mother established as a partnership a school for girls in Washington, D.C. In 1927 it was incorporated as a two-year proprietary (that is, profit-making) institution. As a corporation organized for profit, Marjorie Webster is controlled by a Board of Directors. All five members of the Board are members of the Webster family and several work full-time as administrative officers at the college. All stock in the corporation is held by the family, and Directors collectively fix their own compensation, which in 1969 came to over $100,000. It was precisely these elements of control and free enterprise that were at issue in the suit. Middle States Association restricts its membership, as do the other five regional associations, to non-profit institutions. Over the years it has, therefore, refused many requests for membership by Marjorie Webster for evaluation. It has always refused to visit or accredit the college. Since Marjorie Webster was not eligible for membership so long as it was a profit-making institution, all Middle States would do for it was to suggest that it go non-profit. Conversion to a non-profit institution would have brought heavy taxes to the stockholders. It would also have represented to the Webster family a surrender to discriminatory practice and monopolistic power in education.

There were two primary issues: First, the college, in an unprecedented application of anti-trust laws to education, charged that Middle States and the other regional associations like it were combinations in the restraint of trade within the meaning of the Sherman Act. Secondly, Marjorie Webster charged that Middle States and the other regionals were performing functions that were inherently governmental, that they were performing them at the request of such arms of government as the Office of Education, and that they were therefore subject to the restraints of the Constitution, including the observance of due process, and the avoidance of arbitrary and discriminatory acts. The College sought no damages. It sought only to be visited and evaluated by Middle States on equal terms with non-profit institutions. At the heart of count one, the anti-trust issue, was the question of whether

Middle States was restraining Marjorie Webster's trade to an unreasonable degree by denying it membership. At the heart of this issue was the question of whether the profit motive was acceptable in the operation of colleges; whether free enterprise should have a role in education. Put another way, the issue was whether Middle States' basic requirements for membership--that an institution be non-profit, with a governing board representing the public interest--were defensible and fair. Although the question of what effects the profit motive had on education took up most of the courtroom time, little factual testimony about it could be adduced by either side.

Marjorie Webster's second charge against Middle States was that it was performing functions inherently governmental, that its actions were consequently state actions, and that the regional accrediting associations, like any other arm of government, were subject to the restraints of the Constitution. Marjorie Webster argued further that Middle States had violated the Fifth and Fourteenth Amendments by depriving the college of due process and equal protection, and by having acted in an arbitrary, discriminatory manner by excluding the college from eligibility to membership. The argument went that accreditation has become, fundamentally speaking, a service aspect of the Federal Government in determining eligibility for funding. This has arisen as a result of language written into federal funding assistance legislation by Congress. It has been somewhat characteristic of a revolution. Congress has established that accreditation shall be the prime functional means of establishing eligibility for federal assistance. Six weeks after the end of the trial, Judge Smith announced his decision and released his written opinion--a 59 page statement. He sustained the college on both major issues of the case. On the anti-trust count, he first disposed of the issue of whether higher education should be considered a trade or a commercial activity. Contemplating the myriad of business and often competitive operations of a modern college or university, Judge Smith said that "higher education in America today possesses many of the attributes of business. To hold otherwise would be to ignore the obvious and challenge reality." On the question of whether the profit motive is acceptable in higher education, he

agrees with the essential points that Marjorie Webster had striven to make. Quoting from his opinion:

> Educational excellence is determined not by the method of financing, but by the quality of the problem. Middle States' position moreover ignores the alternative possibility that the profit motive might result in a more efficient use of resources, producing a better product at a lower price. Additionally, an efficiently operated proprietary institution could furnish an excellent educational curriculum, whereas a badly managed non-profit corporation might fail. Defendant's assumptions that the profit motive is inconsistent with quality is not supported by the evidence and is unwarranted. There is nothing inherently evil in making a profit and nothing commendable in operating at a loss.

Further, Judge Smith disposed of the Constitutional count, apparently persuaded that the trial record is clear and unequivocal on the question of whether the regionals have become quasi-governmental agencies. They had. Moreover, they had for reasons deduced in the anti-trust count violated the rights of Marjorie Webster by denying them due process. Out of fundamental fairness, he said, Marjorie Webster is also entitled to prevail on count two.

Judge Smith concluded with a peroration on the public interest and where it really lay in this prolonged litigation.

> A crisis exists in higher education today. There is tension, turmoil and unrest on the American campus. Students dissatisfied with the established routines and unquestioned goals are demanding reform. In addition, institutions of higher education are experiencing severe economic pressures as new methods must be found to meet the challenge. It is becoming increasingly apparent that the demands of the educational deficit cannot be met exclusively by foundation, state and federal financing. With the rapidly expanding population, broad social changes, and the complexities of modern life, higher education in the United States is a matter of national concern. A

> sound educational system is essential to our pluralistic society. This can best be attained by private, non-profit proprietary and public institutions working together toward a common goal, the improvement of higher education. Webster seeks merely a chance to qualify. Middle States refuses to even consider its application for academic recognition. This action is arbitrary, discriminatory, and unreasonable. The American system of free enterprise is structured on fair and open competition, not monopoly. The national interest is not necessarily served by stifling competition from any available source. With the unprecedented demands on educational resources in this country, every institution should be given the opportunity to demonstrate its worth.

* * * * *

Middle States is appealing the case to the Supreme Court. Their argument goes as follows:

> By ruling that education is a form of commerce, it in effect moves education from the enclave of tradition wherein it has grown and flourished for twenty-four centuries, and forces it into the world of commerce, subject to all the restrictions and constraints indigenous to the market place. In effect, it dictates that education is a product, not a process; that a college is a property, not a community; and that a teacher is an employee, not an agent of his civilization. This ruling therefore is in truth what it has been called by many, a landmark ruling. It raises again the issue which arises whenever advocates of a dogmatic position attempt to impose their personal or professional beliefs on the searchers of truth and upon the teachers of new searchers.

Final resolution of the case, if the Supreme Court agrees to hear it, should therefore come during the 1970-1971 session.

D.

Questions Addressed to Respondents

1. What is the earliest possible date by which this event could occur?

2. What is the most probable case advanced by the plaintiff?

3. What is the most probable defense the defendant would bring to bear?

4. From your knowledge base, what implications do you see this case having for the future of education in our country?

5. Could the effects of this case occur without this case or one of its genre going through the judicial process?

6. What types of legislative and judicial events would follow after the event and in what time frame on the Federal level?

7. If you see the event as beneficial to society, what lines of approach might disaffected groups of society pursue to help bring about the occurrence of the event sooner than you conjectured?

   If you see this type of case as threatening to society, what events might legislators/education officials bring to bear to forestall this case?

8. General comments: What other intriguing possibilities do you see as potential issues stemming from the Marjorie Webster case?

9. I understand that all responses will be treated anonymously.
   I (am; am not) willing to have my name used in a list of respondents.
   [See page 42]

Major Conclusions
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List of Respondents
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MAJOR CONCLUSIONS

1. What is the earliest possible date by which the event could occur?
   - 80% of respondents see the case arising and succeeding in 5 years.

2. Most probable case advanced by the plaintiff?
   - Cause of action--negligence; implied contract.

3. Defense?
   - No contract; education not commerce; contributory negligence; assumption of risk; no guarantee; no warranty; common practice; "I can't think of one that will stand up."

4. Implications of case for the future of education in U.S.?
   - Alternative private schools; performance criteria; fascism; community goal setting; taxpayers' suits; end of non-profit corruption to hide poor work.

5. Could the effects of this case occur without such a case going through the judicial process?
   - 90% yes--through legislation.

6. What types of legislative and judicial events would follow?
   - Mandated quality of education; immunity from such suits; performance contracting; teacher organizations seeking immunity for members.

7. Is the event beneficial or threatening to society?
   - 80% see as beneficial to society.

8. What other intriguing possibilities are seen?
   - 85% see increase in the quality of education.

DISAGGREGATE EDITED RESPONSES

1. What is the earliest possible date by which this event could occur?

Today.

This event could occur at any time in the immediate future. While the Marjorie Webster case may be a landmark, there are many social forces leading in the same direction. One is the increasing number of "class actions" in the consumer field. Another is the changing attitude regarding responsibility for school performance. It used to be that if a student failed he was considered responsible. Now, much more frequently, it is the school which is considered to have failed. Thirdly, there is much more emphasis on evaluating performance and on accountability. With increasing militance and the concern over the plight of the disadvantaged, legal action must be perceived by many as an appropriate way to force schools to be accountable. *(Corporate Officer)*

While I would consider it unlikely, I would not really be completely amazed to read of such a case in tomorrow morning's paper. *(University Official)*

About three years from 1971, if the U.S. Supreme Court affirms Webster. This would allow for the initiation of such a case at the District Court level and appeal to the Circuit Court. *(Corporate Officer)*

Reaching Supreme Court--1975. Case filed in lowest appropriate court--1972). *(State Education Official)*

At any time--Surely by 1975. *(Education Official)*

1985-90.

I would say that this is a gradual process which began several years ago and will no doubt continue until educational institutions recognize the validity of this position. *(Private Counsel)*

I doubt this set of facts could result in a judicial action against a public school board. Some administrative proceedings would (or should) be implemented to improve the school. Facts do not show that Brockman is capable of reading above 7th grade level, regardless of quality of instruction, and his diploma may have been awarded for other achievements (otherwise he would never graduate from high school). I don't believe the Webster case will be a precedent for any action against local school boards--purely public and non-profit as compared to private profit-making schools. *(University Official)*

I would say it should <u>never</u> occur. *(University Counsel)*

It will not occur, at least not as stated. There is no standing to complain of the awarding of a degree John Brockman didn't deserve. The true objection is John Brockman's own incapacity, but that in itself is neutral; the school's performance won't be judged simply by the quality of its students. They may be proverbial sows' ears. For all we can tell from the facts, John Brockman was a mongolian deaf mute whom the school has turned into a functional human being (and therefore deserves a medal). Unless the school <u>promised</u> that John Brockman would achieve a higher level or it has failed to employ means reasonably related to John Brockman's needs, there will be no liability tomorrow or in 2010 A.D. *(Law School Faculty)*

I cannot conceive that it would occur at all, for the holding in the Marjorie Webster case was based on anti-trust law and seems to me to have absolutely nothing in common with the set of facts suggested for Brockman vs. The LaFayette Board of Education. *(University Official)*

2. What is the most probable case advanced by the plaintiff?

Unequal educational opportunity according to need. *(State Education Official)*

Defrauded by the award of a diploma. *(University Faculty)*

The State Law on Education presumably imposes a responsibility upon the particular board. The diploma is the certification that the Board has discharged this responsibility, using the public monies appropriated for this purpose. The remedies are uncertain: additional education to correct the deficiency? Court orders to improve the system? *(Private Counsel)*

The plaintiff may have argued that Brockman was a "normal individual" and that as such he should have been able to perform at the high school graduate level. Perhaps Brockman has various test scores to back up his argument about intellectual level. Likewise, Brockman's lawyer probably produced planning guides from the LaFayette High School showing what a student was supposed to be able to do as a result of the various courses Brockman has received passing grades in. Brockman's lawyer may also have been able to show negligence or indifference on the part of some of Brockman's teachers. He may also have been able to show that although Brockman was not performing well he was not offered remedial or compensatory education. *(Corporate Officer)*

I would assume that either through tuition payments or local taxes or both, the plaintiff would argue the existence of a contract--probably citing school district statements of objectives as the contractual obligation of the district. The diploma really would be only a side-issue; the basic issue would be a claimed breach of contract. *(University Official)*

No quid pro quo--for tax monies the local school had to use--inadequate supervision of policy and programs and budget of the school board. *(University Official)*

Two possibilities:

a. Pure contract--you agreed to provide this level of achievement and failed to do so;

b. Modified contract--you negligently or intentionally certified I have skills which I lack (by the issuance of your diploma) upon which certification I relied to my detriment.

(University Counsel)

Plaintiff would argue that there is an implied contract between the parent-taxpayer and the school district to which the student is a third party beneficiary. That such contract guarantees that the student upon receipt of his diploma has achieved a degree of academic competence reasonably compatible with standards of performance normally associated with other students who have been awarded the same diploma. *(National Organization)*

It is in the public interest to encourage private facilities that will help reduce the public burden. *(University Faculty)*

I am at a loss to know what it is that Brockman is suing for. The fact that a student is defined as a consumer for the purposes of the anti-trust law as interpreted in the Marjorie Webster case seems to me to have little application to the situation where the student is receiving a public education in a non-contractual situation. *(University Official)*

3. <u>What is the most probable defense the defendant would bring to bear?</u>

Not a party to the contract; incidental beneficiary.
Performance is "aggregate" not individual.
Student is not a "consumer"--education is the product of a process.
No standing to sue. *(University Counsel)*

Defendants would contend:

1. There is no contractual relationship between the taxpayer and the school district;

2. That since elementary and secondary education is a governmental as opposed to a proprietary function any suit may be barred under the doctrine of sovereign immunity;

3. That since the student has received his diploma, plaintiff has failed to allege any ascertainable damages;

4. That a diploma only assures that the student spent x hours in class and passed y number of required courses and is not a guarantee of any standard of course content to student achievement.

(National Organization)

Education is not a form of commerce; education whether operated for profit or non-profit is a process carried on for the benefit of the public and should be subject only to regulation by the persons most capable of determining such regulations, namely, the educational community. That otherwise education becomes a federal sponsor program in which politics will play a most important role. *(University Counsel)*

No undertaking was made on the school's part that the student would learn, only that the opportunities for learning would be made available to him. The diploma represents not any given degree of achievement, but accomplishment of minimum requirements which he has accomplished. *(University Counsel)*

(1) Contributory negligence;

(2) Assumption of risk;

(3) Failure to cooperate. *(University Counsel)*

Plaintiff has no cause of action there being no show of malfeasance on Board's part. There is no duty on part of school board to guarantee a reading level achievement standard for graduation therefore no cause of action.

School does not guarantee fixed results and many other factors affect achievement. *(State Education Official)*

It was not subject to suit on various legal grounds. I do not know what these would be. Undoubtedly, the defense argued that it offered quality education and that it was Brockman's responsibility to take advantage of it. It probably was argued that the granting of a diploma was not an assurance with respect to performance but only with respect to attendance. Generally the defense would fall back on the position that responsibility for learning was on the student and that the school was not responsible for students who did not perform well. *(Corporate Officer)*

The school district would argue that it guarantees to and did provide educational services and that it cannot and does not undertake to guarantee results. As an example, it would cite the long-standing grading system as evidence of varied results. *(University Official)*

The preparation of a plan and program to effectively carry out its educational responsibility; the attempts to secure the necessary funding from State, local and possible Federal sources; reports on the effectiveness of their program from qualified educators. Also, to establish credibility, records of past graduates who have succeeded in further educational activities or in subsequent careers. Plaintiff's record should be analyzed to see if special problems existed, if efforts were made to cope with them; and whether there was likelihood of an "impossible" task. (However, this would be admitting of fraud in granting diplomas.) *(Private Counsel)*

That a diploma is not a guarantee of the acquisition of basic skills. This depends in part upon the student's ability, application, etc.; and therefore the school cannot be held responsible or accountable. *(University Faculty)*

No contract--no consideration, offer of acceptance on the degree of reading ability of graduates. *(State Education Official)*

I would assume that the defense would make the point that it does not guarantee any student an education, but that it offers only an opportunity, and that there is no contractual duty, or other type of legal obligation, which would require that a student be assured of achieving at any particular level. *(University Official)*

That the diploma contains no implied warranty. *(Corporate Officer)*

The inability of the individual to learn. It might bring forth a "Scopes Trial" on learning theory that could have some profound reactions. *(University Official)*

Education is <u>not</u> a form of commerce. Teachers are <u>professional</u> people--and may be disciplined as such by their professional organizations, but should <u>not</u> be subject to regulations as <u>tradesmen</u>. *(University Counsel)*

Schools were not established to serve needs of all. Community has not mandated nor supported such a program. Defendant was exposed to the same opportunities as everyone else. *(State Education Official)*

It is not an agent of the state in the sense one talks of "state action" within the 14th amendment. That the defendant is primarily a private organization. *(Law School Faculty)*

Common practice was followed. *(State Education Official)*

I really can't think of one that will stand up. *(Corporate Officer)*

4. From your knowledge base, what implications do you see this case having for the future of education in our country?

Little--schools would redefine what the awarding of a diploma means . . . *(University Counsel)*

Diplomas would not be awarded, as they seem to be now, on the basis of the number of years in attendance, but that standards of achievement would be established and it would be made clear that the institution made no guarantee of the level of achievement which any given student might attain in a given period of time. *(University Official)*

1. Might encourage experimentation through radical schools;
2. Will strongly encourage "independent" schools set up--to evade racial legislation by the Federal government. *(University Faculty)*

An assessment of the performance of the educational establishment and the limits of delegation of public responsibility, i.e., education of the young. It will further stimulate national and statewide testing. It may lead to the development of the concept of the "irresponsible consumer" as a defense. *(University Counsel)*

The possibility of court action will provide a significant level for forcing change in schools. *(State Education Official)*

It will not lead to freedom, but to Fascism. It would entirely change education as we have known it. It would reduce an honorable profession of teaching to a common commercial practice. *(University Counsel)*

All students who failed at graduation to meet 12th grade achievement levels in any or all subject matters could maintain a cause of action for failure to receive an adequate education. *(National Organization)*

The accreditation of institutions of higher learning would have to be assumed by a state or federal agency which would place higher education in the political arena and lower the standards now maintained by higher education institutions. *(University Counsel)*

Perhaps much greater care in determining who will be given diplomas. *(University Counsel)*

The state examines public schools and programs for "accreditation" and holds Boards accountable (and Administrators). *(University Official)*

It will tend to force better interaction and communication between the school and the community--more community involvement in determining goals. *(State Education Official)*

A furthering of notions of accountability of which performance contracting is an example. So, too, is community control. So, too, may be various other schemes. *(University Official)*

I do not believe that accountability for schools can be legally established. The idea, however, is likely to result in much greater toughness on the part of school boards and parent groups. Secondly, I believe that this trend will result in the insistence on criterion-referenced measures of educational outcomes, so that nobody will listen to the phrase "reading at the seventh grade level." This will have to be expressed in terms of independent, identifiable criteria of reading. *(University Faculty)*

It has many implications with the advent of Performance Contracting and the Voucher System. Almost forcing a guaranteed education. *(University Official)*

Favorable. Education needs to have the pressure of performance and effectiveness brought upon itself. It is possible to ignore lack of adequate performance in training the youth for their societal tasks, partly due to the long interval between preparation and the proven worth. Research will have to be accelerated into the learning process so that the institutions can learn how to measure, how to evaluate alternatives, how to select for populations involved, etc. The need to have a technical defense for such suits may help move us in that direction. *(Private Counsel)*

1. The taxpayer refusing to support educational system;
2. Whoever determined student to be a 7th grade reader would be made a cross-defendant by the Board. *(University Counsel)*

Increased accountability for achievement of individual child. *(State Education Official)*

A. The possible range of outcomes of a school is still not described well by educators. By claiming too much, such cases can result. This case could, then, lead to more "truth in advertising."

B. There could be developed a better understanding of the necessary relationship of Education (or schooling) as a subset of education (or learning). *(University Official)*

Great impetus to the old concept of accountability or performance evaluation. Because of these new emphases the old structure of education might be radically changed. Probably private enterprise would have a much greater involvement in rendering direct educational services. The role of teachers might be radically changed, with much greater pressure for responsible quality performance and much less employment protection. *(Corporate Official)*

Remove the screen of "non-profit" behind which many questionable practices are found and assist in placing education on a performance basis. It might

also further clarify the confusion that exists in higher education relative to teaching versus research. On the whole the results could be favorable. *(Corporate Official)*

5. Could the effects of this case occur without this case or one of its genre going through the judicial process?

Yes--Aroused citizens pressuring school boards at all levels. *(University Counsel)*

Yes--I will probably personally use this as a way to force my school district to develop a more flexible program with teaching styles matched to the child's learning style. *(State Education Official)*

Of course. Laws are made by legislatures as well as by the courts, and customs change as a result of social action as well as by law. *(University Official)*

Yes. As part of a trend, this action is only one of many possibilities. *(University Faculty)*

It might occur in relation to an arbitration clause in a performance contract where there was disagreement over the results. In the alternative, it might arise as a civil rights case in the administration process. It might develop as a political issue. *(University Counsel)*

Yes, as far as public schools are concerned the process should be administrative and not judicial. As far as private profit-making schools--state regulation should provide for "accreditation" or voluntary examination by associations of the private profit-making school. *(University Official)*

Yes. By arousing public discontent with the inadequacies of the educational structure, process, and accomplishments; however, this route may not be realistic due to the long interval between the educational preparation of the student and his eventual life career and performance which might disclose his shortcomings due to educational deficiencies. *(Private Counsel)*

Yes--could and is. I see much of our current school unrest as being another approach to the same basic question: Are they (the schools) delivering what they claim to deliver? *(University Official)*

I believe the effects such as those described might well take place without pressure of judicial rulings. Legislative pressure to improve the schools is very great. The demands of minority groups is equally strong. The possibility of for profit education is being seriously studied and will undoubtedly be tried. *(Corporate Official)*

No. *(University Counsel)*

Under the present method of accreditation I do not believe this would occur without a case being decided by the Supreme Court. *(University Counsel)*

No--not in a democracy. It could in a totalitarian regime. *(University Counsel)*

6. <u>What types of legislative and judicial events would follow after the event and in what time frame on the federal level?</u>

Legislative--state level: Probably prohibit suits against public school districts except for carefully outlined reasons.

Legislative--federal level: Mandate quality of education as prerequisite for securing federal funds.

Judicial: Decline to accept jurisdiction for many years. *(University Counsel)*

I assume that a legislative remedy would be applied to cure any defects flowing from such a judicial determination, and that such legislation would be prompt. *(University Official)*

If proprietary schools are ruled for, then a lot of existing legislation will be updated to include proprietary schools--much as state legislation is now being re-written to include parochial schools both as beneficiaries and obligants (if there is such a word). Probably within ten years. *(University Faculty)*

Legislature would provide immunity against suit statutes; set up investigation commissions to inquire into "the failures of education," etc. Federal agencies would seek to expand performance contracting but would give immunity to contractors. Courts would be split on the theory and result of this decision at state and federal levels. The refusal to review a case is not a statement of approval or disapproval. *(University Counsel)*

OE could require that each state, under penalty of loss of funds, set up minimum guidelines for the courses taught in their schools (such as the N.Y. Regents exams) in order to ensure that the recipient of a high school diploma has achieved a reasonable level of performance. *(National Organization)*

After the decision by the Supreme Court that the lower court's position is sustained, that legislation would be proposed which would either exempt educational institutions from the effects of the Sherman Act or which would establish some type of regulatory agency to provide for accreditation of all institutions of higher learning. I would believe that the various inroads already made into the field of education by the federal legislative body. *(University Counsel)*

Probable legislative reversal of the law. Judicial reaction would probably be a flood of cases of this nature. *(University Counsel)*

I doubt that any would be necessary but much would be enacted. *(State Education Official)*

I think the emphasis upon accountability is growing--will become of such importance that this case would be but an event in a much larger process. *(University Official)*

1. Additional support for performance contracting.
2. Additional emphasis and support for criterion-referenced testing, independently defined realistic objectives.
3. Additional support for private vs. public schools.

(University Faculty)

Uncertain. The basic responsibility is in the States; Federal involvement has been limited, usually in face of national emergency (national Defense as in 1957), or as easing the financial load due to poverty-stricken populations (Title I ESEA, etc.). Legislative involvement would probably be "in the public interest" and through supplying funds to the states for helping them. This kind of effort is based on effectiveness of lobbies, support for particular programs. Judicial involvement might be to compel the states to execute more effectively their responsibilities in the field of education. Consumer class suits might be the basis; or suits by private enterprise to serve as alternate institutions for doing the task with the benefit of some of the public monies set aside for this. *(Private Counsel)*

The effect could be profound depending upon the penalty assigned by the court. The news release does not mention the award of the court to the plaintiff. At a minimum, this court decision would result in diplomas by examination rather than by completion of courses. *(University Official)*

Undoubtedly school systems, professional education associations, and other interested parties will try to persuade legislators to pass legislation

exempting schools from private enterprise pressures and performance responsibility. Probably the NEA and the AF of T will launch strong legislative efforts to limit entry into the school market. Many laws defining how federal monies can be used will need to be changed so that private enterprise can receive grants or loan guarantees under the appropriate legislative acts. *(Corporate Official)*

Teacher organizations would seek immunity for their members. *(State Education Official)*

I can't see anything happening in the immediate or even foreseeable future. *(Corporate Official)*

7. If you see the event as beneficial to society, what lines of approach might disaffected groups of society pursue to help bring about the occurrence of the event sooner than you conjectured?

   If you see this type of case as threatening to society, what events might legislators/education officials bring to bear to forestall this case?

Spur establishment of vocational training schools and dispel the myth that a college degree is the end all for all children. *(University Counsel)*

Efforts to have local "community" control over all schools fitting within the "public" system--whether proprietary or not. *(University Faculty)*

Society is already sufficiently disenchanted with the failures of public education K-12 as well as higher education. It offers an avenue to minority leaders to offer responsible alternatives, including private contractor delegation. It will unsettle education, teachers' unions, the parent as consumer, the military-industrial-business mythical establishment which has been educating or discarding the products and waste products of American education. Minority groups could coalesce in a broad-based movement to

reform American education which has proven so inadequate in educating their youngsters. Much sympathy would be generated for a "payment" plan to shop for the best school. It would sound the death knell of public education and cause a shift to private and parochial alternatives. *(University Counsel)*

A. Minority groups, especially in urban areas, could file numerous actions claiming that the diplomas awarded in their areas are a fraud and that possibly their rights have been abridged under the equal protection clause of the U.S. Constitution.

B. Legislators could by statutory enactment bar any cause of action against a school district for failure of a student to achieve a particular level of academic competence. *(National Organization)*

Beneficial. Various legal aid to disadvantaged programs meeting together to discuss the implications of the case enlisting the aid of state departments of education. *(State Education Official)*

Why forestall the case? Vote in local school Board elections--parent participation in school affairs. *(University Official)*

Beneficial, but I think the same results can and should be achieved by communities involving students, parents, taxpayers, board members, and educators in making specific decisions on the goals of education. *(State Education Official)*

I don't think it is threatening. Making education responsible and accountable. *(Education Official)*

Beneficial.

(1) Support for the idea of performance contracting;

(2) Insistence on performance objectives and criterion-referenced testing in local schools;

(3) Tendency to support private schools, rather than public ones.
(University Faculty)

(Beneficial). A dialog should be mounted seeking to determine whether the educational task in our society is being adequately discharged. A first question or determination would be to establish more definitively: What is the purpose of education in our present day society? The answers to this question could then serve as a standard for evaluation of the quality of the job being done. More important is the projection of what will education have to do to meet the needs of the future decades; the nature of society is changing so that planning for today's needs, if adequately done, could fall far short of coping with the future needs. *(Private Counsel)*

Beneficial, although there are clearly dangers and the pendulum could readily swing too far. The involvement of educational institutions in instruction, research, and community service have developed traditional patterns which are now being challenged. The rationale and the amount of effort educational institutions should devote to these three activities need to be better rationalized than is now the case. Taxpayers are expressing dissatisfaction with the performance of the schools and will increasingly do so. Similarly, disadvantaged groups are exerting pressure which is in some ways supplemental to the taxpayers' pressure but in other ways would require greater tax support. The role of the Federal Government in research at universities is undergoing radical restructuring. Depending on the level of defense expenditures and the resolution of international problems, we may well see a major set of pressures to revise the education system. *(Corporate Official)*

Beneficial. As it should bring about long overdue reform in teacher preparation programs and reorganization of inadequate and ineffective school programs. *(State Education Official)*

Threatening. The events that I would bring to bear are to improve the understanding of what schools can and cannot do; to impose the financing of

education so schools can do more than they are now doing; and to establish certain minimum standards as absolute requirements for various diplomas. *(University Official)*

Threatening--That education officials and legislators favorable to the existing system of higher education should propose legislation exempting such institutions of higher learning from the requirements of the Sherman Act similar to the McCarran Act relating to the insurance industry. *(University Counsel)*

Definitely (threatening)--If Supreme Court affirms, Congress should nullify by passing legislation declaring that education is not a form of commerce and that anti-trust laws do not apply to educational institutions--and accrediting functions are not governmental. Whether government subsidy should depend on such accreditation is an entirely different matter. *(University Counsel)*

Threatening in ways which would immediately result in legislative correction. I do not think the Brockman case is any way a logical extension of the principles announced in the Marjorie Webster case, however, and I see possible benefits to society should the decision of the lower court in that case be permitted to stand by the Supreme Court. *(University Official)*

8. General Comments: What other intriguing possibilities do you see as potential issues stemming from the Marjorie Webster case?

Increase in the number of "teach for profit" schools--with possible drain on enrollment at some present private colleges--perhaps forcing them (present colleges) into state systems. Courts would be clogged with litigation involving schools--legislation would undoubtedly follow decision. *(University Counsel)*

The intriguing possibilities are that proprietary institutions may thus be able to achieve accreditation, with all that may mean for such institutions. It could mean that it might even be respectable for an educational institution to pay its own way. *(University Official)*

Sensitizing "liberal" elements of the public to the general question of profit-making in education; possible legislation against conglomerates which are invading the schools--certainly public shock at the extent to which this is happening. Hopefully a series of explicit confrontations of school men by the charge that they have abdicated their professional responsibilities and should show cause why public education should be supported any further. *(University Faculty)*

Some have already arisen in collective bargaining in that teachers have rebelled against the inadequate facilities, class size, etc. The federal government has already authorized performance contracts for reading levels. Charlatans will try to dazzle the public and hoodwink officials. Many major corporations now have gone into the trade school business, so why not the general education business. It might lead also to changing the "accreditation" requirement for federal aid. The most intriguing is that it will be ignored and other means to mobilize public opinion will be used. *(University Counsel)*

Can be used to advance individualization of instruction, differentiated staffing. *(State Education Official)*

Unlimited. Brockman vs. LaFayette School Board is an example. Just think of all the bad things that might happen when you start treating teachers like bricklayers and students like brick and mortar. *(University Counsel)*

In view of the Court of Appeals decision, the only major issue remaining is how far can accrediting boards go before they run afoul of the anti-trust laws and/or the due process clause of the Constitution. *(National Organization)*

It would appear that the cooperative relations between institutions not for profit and institutions operated for profit would be set back as a result of affirmance of this decision. It might result in the adoption of legislation which would prohibit institutions of higher learning being operated for a profit. *(University Counsel)*

A greater care on the part of accrediting institutions about their sometimes arbitrary rules. *(University Counsel)*

Three pronged educational system:

Public	Coordinated into one working system or
Private-charitable	Uncoordinated in a competitive system possibly destroying the private-charitable concept.
Private-proprietary	

(University Official)

It could have a desirable effect on educators by requiring accountability and also clarifying what they are and are not accountable for. Could have a very bad effect on students and parents in that they might feel that all of the responsibility rests with the school. *(State Education Official)*

New methods of accreditation. *(University Faculty)*

Guaranteeing partial education for some. *(Education Official)*

Education has remained a cloistered, traditional function, setting its own goals and standards which are called into question at long intervals. It is heavily labor-intensive, self-protective of itself as a community, and without sufficient integration into our economic process to be called into account for performance. The pressure of competition from the private enterprise area, under careful controls as to ultimate goals (particularly non-economic) should reinvigorate the educational function leading to more research on learning, how to be more effective in teaching-learning, transference of technologies from other scientific areas. *(Private Counsel)*

The Marjorie Webster case will have interesting implications for accrediting organizations and for the professions. The role between the Federal Government and the accrediting organizations will have to be reexamined. The standards set by the professional organizations relative to entry into the profession may come under attack. Another poorly defined change that may come about has to do with the influence and power of the elite education hierarchy. The Middle States Association seems to be unusually "stand-pattish" and authoritarian in their position. There are many pressures challenging the educational hierarchy and if widely used, the Marjorie Webster case could be another important pressure on this group. On the other hand, the number of for profit educational institutions is probably small and not very powerful and thus the Marjorie Webster case may be more isolated and have less influence than the theoretical analysis might indicate. *(Corporate Official)*

The opening up of correspondence instruction, more independent study, and, in general, the use of measurement and evaluation more extensively without regard to certain trappings that persist in preventing people from reaching their full potential. *(Corporate Official)*

An opportunity to more easily eliminate ineffective teachers. *(State Education Official)*

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PROPOSED AREAS FOR POLICY ASSESSMENT

1. MANDATORY ATTENDANCE (if education is a consumer business, can you make a consumer buy in a monopoly system?).

2. OPEN ADMISSION TO HIGHER EDUCATION (as a right?).

3.

4.

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   a. Preparation of a histogram of the legal precedents set in the 1960's for a forecasting base for the mid-1970's.

   b. Preparation of a conjecture handbook available to the law schools of the country.

- -

Please return this to: Dr. Stuart A. Sandow
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1. I would be interested in seeing the results of a similar exercise looking at the possible issue _____.

2. I think the _____ *(Organization or Foundation)* would look favorably on supporting continued work in this area.

3. I would like to discuss this with you. Please call me at ( ) _____ .

4. Name _____ Address _____ Title _____.

5. Comments _____

_____